IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1957

No. 164

HENRI SADACCA,

Petitioner

vs.

NYLONET CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To The United States Court of Appeals
For The Fifth Circuit

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To The United States Court of Appeals
For The Fifth Circuit

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on April 18, 1958.

CITATIONS TO OPINIONS BELOW

The United States District Court in and for the Southern District of Florida, Miami Division, rendered no opinion in this cause. Its final judgment appears in the printed transcript of record, nine copies of which are

submitted herewith, at pages 38-39. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix "A" hereto, infra, page App. 1, is reported at 254 F. 2d 238 (5th Cir. 1958).

JURISDICTION

The judgment of the United States Court of Appeals, Fifth Circuit, was entered on April 18, 1958, (R. 238; App. p. 3, infra). The jurisdiction of this Court is invoked under 28 U.S.C. Sec 1254(1).

QUESTIONS PRESENTED

Whether a United States Court of Appeals in exercising its appellate jurisdiction may notice as plain error the failure of a District Court to instruct on defendant's theory of the case (as opposed to instructing on the issue in the abstract); and the error involved in instructing that an ambiguity in a contract is to be construed against the drafter thereof in a situation where this instruction was totally misleading to the jury although no objection to either of these instructions was urged by counsel.

Whether Rule 46 of the Federal Rules of Civil Procedure modifies Rule 51 of those Rules so that a party having tendered a specific written instruction which is subsequently denied need not raise a perfunctory objection to this denial.

STATUTORY PROVISIONS INVOLVED

Rule 51 of the Federal Rules of Civil Procedure adopted pursuant to 28 U.S.C. Sec 2072 is as follows:

Rule 51. Instructions to Jury: Objection

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT

Nylonet Corporation, the Respondent, and Petitioner, Henri Sadacca, contracted on September 30, 1952, for the payment by Respondent to Petitioner of five cents for each "weather bonnet" sold by Respondent in return for the procurement by Petitioner of this item from contract manufacturers. Petitioner procured the bonnet initially, and after the product filtered to the general public, complaints that it was defective were received by Respondent who thereupon sued Petitioner for breach of contract. Jurisdiction was based on diversity of citizenship. Petitioner counterclaimed for the five cents per bonnet which had never been paid. The jury after the court's instructions, returned a verdict for Respondent for $5,795.95 plus costs and refused Petitioner relief on his counterclaim. The District Court denied Petitioner's mo-

tion for a new trial and entered judgment on the verdict.

The theory of Respondent's case was that the defects in the weather bonnet were Petitioner's responsibility, because of the phrase "supervise manufacturing" in the first paragraph of the contract, (App. C infra) terminology which Respondent equated with a guarantee of quality. Petitioner contended that, at best, this language was ambiguous when juxtaposed with the omission of the word "manufacturing" in the third paragraph ("to supervise and purchase") and when the nature of the necessary relationship to contract manufacturers, who operate their own factories and cannot tolerate quality controls imposed by third parties, is considered. Petitioner maintained that he had only undertaken to supervise the purchasing and supply of the bonnet. Evidence of the understanding of the parties, was, therefore, admitted by the trial court. The president of Respondent, Lewis Escott, and a former employee, B. H. Shapiro, buttressed Respondent's theory (R. 68-71; 177-79). Henri Sadacca, Petitioner, and Floyd David Cerf, a director and former officer of *Respondent*, bulwarked the interpretation contended for by the defense (R. 56-7; 114; 164).

The wording of the contract itself was resolved after the parties had met to discuss their project. Terms were agreed upon, and, at the suggestion of Mr. Cerf, then an officer of Respondent, the agreement was reduced to writing. Petitioner dictated the language which was transcribed by Respondent's secretary, after which everyone read the contract, and agreed that it represented what the parties had discussed. The contract was then signed (R. 70; 120-21).

Another aspect of Petitioner's case was that the con-

duct of Respondent subsequent to the signing of the contract constituted a waiver of Petitioner's performance. Complaints as to the quality of the product were sent to the manufacturer rather than to Petitioner (R. 97), and that Petitioner did not receive even copies of various letters sent to the manufacturer (D. Ex. 1-3; R. 200-11) was conceded by the president of Respondent to be probably the deliberate act of Respondent's officers (R. 102). No reasonable explanation was offered for the failure to send these copies to Petitioner, and Petitioner testified that he was never aware of any problems as to the weather bonnets until 1955, some three years after the contract was signed (R. 166). The president of the manufacturing corporation, Mr. Rosen, testified that Respondent's president visited his plant in New York and attempted to have the price of the product lowered (R. 137) and also chose the colors of the bonnet (R. 144-45). And Mr. Cerf indicated that, after the initial purchase, Respondent undertook to procure the product (R. 114).

The court's instructions to the jury on the crucial issues of waiver and the ambiguity in the contract were not objected to below and were asserted to be "plain error" in the Fifth Circuit, which, affirming, declined to recognize these errors on its own motion. On the waiver issue, the trial court omitted any reference to the various factors that contributed to the waiver and merely defined the abstract concept of waiver in further abstractions (App. "B", infra p. 4). On the issue of the ambiguity in the contract the court instructed the jury that any ambiguity was to be construed against the "drafter" of the contract thus invoking the much abused contra proferentem canon of construction (App. "B", infra p. 4). The Court of Appeals reasoned that any error that may have

occured in this instruction was vitiated by the "if" clause: "Should you be convinced by the testimony that Mr. Sadacca did draw this contract". But there was no dispute that Sadacca did the actual dictating. The reasoning of the Court of Appeals, as the Reasons for Granting the Writ section amplifies, missed the thrust of the error, which was simply that this instruction should never have been given since it could not do other than mislead the jury.

REASONS FOR GRANTING THE WRIT

1. The meaning and scope of the concept of plain error is a subject of confusion to practitioners and variation in the various federal circuits because of the lack of a clarifying definition by this Court. Rule 51 of the Federal Rules of Civil Procedure, p. 3 supra, has never been given literal meaning.[1] Superimposed on this rule has been the undoubted power of a federal court to do justice in the abstract.[2] The concept of plain error infuses into Rule 51 a tempering of what would otherwise be an unduly onerous burden. This much is clear, but granting that there is error, when does the error become plain? To this question a variety of answers have been given and much divergence of viewpoint has been expressed. There has never been a considered examination by this Court of this problem. The facts of this case afford an opportunity to consider the intricacies of Rule 51 in terms of two different and interesting common law concepts which pre-

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[1]Except by the Ninth Circuit (See p. 9 infra).

[2]28 U.S.C.A. § 2106.

sent an appropriate set of circumstances for clarification of a standard that heretofore has been wholly subjective and therefore wholly unpredictable.

There have been no debatable cases involving Rule 51 before this Court since the Federal Rules were adopted twenty years ago. The Rule was cited by this Court in *Weade v. Dichmann, Wright & Pugh*, 337 U.S. 801 (1949) in a situation where the petitioner asserted an entirely new theory that had not been passed on below and contended that failure to give an instruction on this theory was error. This contention was held to be non-assertable in the appellate court in accord with all precedent. In *Palmer v. Hoffman*, 318 U.S. 109 (1943), the only other applicable Supreme Court case since adoption of the Rules, counsel requested a single charge on two different causes of action with different rules applicable thereto. There was no attempt made to discriminate between the different theories and this Court refused to consider the error that might have been applicable as to one of the theories. Once again, the decision was clearly in accord with all precedent. The most frequently cited Supreme Court examination of the plain error problem is *U. S. v. Atkinson* 297 U.S. 157 (1936). Although this case is directed to the problem of an error in the court's charge, it was decided prior to the adoption of Rule 51. Moreover, the fact that this opinion is now almost one-quarter of a century old militates against its effectiveness.

Illustrative of the difficulty appellate counsel have in estimating their chances of success on a plain error appeal and accordingly in counseling litigants as to whether to pursue such an appeal is the very proliferation of cases in recent years involving plain error. The cases under the

applicable classification in Volume 28 of the United States Code Annotated total ninety-one in the pocket part, covering decisions from 1951 to the present, and forty-seven encompassing the period from 1938 to 1950. Moreover, since Volume 250 of the second series of the Federal Reporter corresponding approximately with the beginning of this year, there have been over fifteen appeals in which this point has been material. This constantly expanding increase is illustrative of the lack of any defined standard and demonstrates the need for clarification of the plain error concept.

Moreover, it is not merely counsel who would appear to be confused by the generalities of the doctrine; judicial treatment of the plain error problems demonstrate a similar uncertainty. Roughly four-fifths of all decisions on plain error involve a certain dualism. The court first holds that the error was not sufficiently raised below and then goes on to state that there was no error, in any event, in the charges given. E.g. *Reeve Bros. v. Guest*, 131 F. 2d 710 (5th Cir. 1942). Sometimes the formula is reversed and the court will state that there is no error and even if such exists there was no adequate preservation of the point fo rappellate review. E.g. *Huse v. Consolidated Freightways*, 227 F. 2d 425 (7th Cir. 1955). In still other instances the court evinces an uncertainty as to which ground should be the predicate for the result. E.g. *Bellak v. United Home Life Ins. Co.*, 244 F. 2d 623 (6th Cir. 1957). In a sense this dualism is simply a means of adding another string to the bow, buttressing an adequate conclusion. However, the question is certainly apposite as to whether or not the circuit courts have not, in some instances where they were not fully persuaded on either the error or the adequacy of the objection, tended to use one

point to bulwark the other when it had no real place in the formulation of the decision on the other point and have, therefore, reached inappropriate conclusions. The remarkable repetition of the formula "the error wasn't preserved and even if we consider that it was, nevertheless . . . " demonstrates that consideration by this Court of Rule 51 would be of aid not merely to counsel but also to the various circuits in their approach to litigation involving this rule.

2. Variation in approach between the various circuits to the plain error problem has been marked and may be said to amount in some aspects to a conflict between circuits on the entire problem. The 9th Circuit in *Lynch v. Oregon Lumber Co.*, 108 F. 2d 283 (9th Cir, 1939) declared a flat policy of not noticing plain error under Rule 51 although prior to the adoption of the Federal Rules it had noticed such error under its own rule. The 9th Circuit has never reversed for plain error and its latest consideration of the problem, *Walker v. West Coast Fast Freight Inc.*, 233 F. 2d 939 (9th Cir. 1956), while indicating some uncertainty because of the reversals that have occurred in other circuits, demonstrates that the *Lynch* case has never been specifically overruled in the 9th Circuit. There would appear to be considerable question as to whether or not that circuit would reverse for any error in the instructions not raised below.

On the other hand, the District of Columbia Circuit and the 5th Circuit have probably been more liberal in their treatment of the plain error problem than any of the other circuits. E.g. *Shimabukuro v. Nagayama*, 140 F. 2d 13 (D. C. Cir. 1944) (the first case to reverse because of

plain error in a charge); *Mondshine v. Short*, 196 F. 2d 606 (5th Cir. 1952).[3]

Examples of the variety of judicial approach to the same plain error problem abound. In *Richmond F. & P. R. Co. v. Brooks*, 197 F. 2d 404 (D.C. Cir. 1952) the District of Columbia Circuit held that a correct instruction on the Safety Appliance Act went to the core of the case and that it would review an asserted error in the instruction although no objection had been raised below. The Court then found that there was in fact no error. In sharp contrast, in *Bedwell v. Grand Trunk Western Railroad Co.*, 226 F. 2d 150 (7th Cir. 1955) the 7th Circuit disposed of a similar contention in a Safety Appliance Act suit with the simple comment, "The defendant made no valid objection to the giving of this instruction and is not in this court in a position to urge error in that regard." 226 F. 2d at 155.

The position of the various circuits with relation to the problem of damages in a variety of contexts is also instructive in this regard. In *Smith v. Welch*, 189 F. 2d 832 (10th Cir. 1951) the trial court omitted entirely any instruction on the issue of damages. The court refused on

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[3]Despite this liberality, both the 5th Circuit and the District of Columbia Circuit can be quite abrupt in their treatment of a plain error appeal which has cost the litigant considerable money in terms of preparation and counsel fees and which is frequently undertaken because subjective standards fail to afford counsel any guide in recommending appellate review. The 5th Circuit disposed of the present appeal in exactly one page of the June 19th advance sheet, 254 F. 2d 238. In this same advance sheet the District of Columbia Circuit took the same space to reach a similar result on another plain error appeal, 254 F. 2d 348. It is, of course, not merely expense to litigants that is here involved, but also the burden on appellate courts that could be appreciably lightened through not having to consider ill-advised appeals.

the basis of Rule 51 to reverse for this omission. In *Mass. Bond & Ins. Co. v. Dilschneider, Inc.*, 203 F. 2d 556 (8th Cir. 1953) an instruction on damages was asserted to be erroneous because any damages were said to be conjectural. The court rejected this statement on the basis of failure to object below. However, in *Dowell Inc. v. Jowers*, 166 F. 2d 214 (5th Cir. 1948) *cert. den.* 334 U.S. 832 (1948), the Fifth Circuit reversed on the basis, *inter alia*, of an error in the instruction on damages where the trial court intimated what amount had been awarded in a comparable case; and in *Sandifer v. Electrolux Corp.*, 172 F. 2d 548 (4th Cir. 1949) an improper charge on the need to prove special damages in a slander case was reversed by the 4th Circuit. Why a complete failure to instruct or a vague and misleading instruction should differ essentially from an instruction that mentioned a specific monetary amount or an instruction that imposed an improper requirement is not readily apparent. The theatment of the four Circuits of the damages issue reveals the extreme subjectiveness and unpredictability of the plain error problem. The very term "plain error" in itself is a categorization that, like "public policy", is used to rationalize a result; the concept gives no hint as to the factors actually involved in the individual decision. This Court, in the exercise of its supervisory powers over the administration of justice in the federal system, can immeasurably aid in removing some of the confusion that presently exists. The circuits should be uniform in their treatment of the plain error problem.

3. Still another problem under Rule 51, apart from the applicable standard to be used in determining whether or not an error is "plain", is the adequacy of the presentation to the court of the objection raised and the extent to which Rule 46 of the Federal Rules of Civil Procedure,

rendering formal objections unnecessary, impinges on Rule 51. The instant case raises this question since one of the plain errors asserted is the failure of the court properly to charge the jury on Petitioner's theory of the case on the issue of waiver by the Respondent of his right to have Petitioner supervise any manufacturing. The instruction as requested and as given by the court appears in Appendix B infra, p. 4. The 5th Circuit in its opinion did not treat the problem raised by this instruction as essentially different from that raised by the other asserted error relating to construction of an ambiguity against the draftsman of the contract. Nevertheless Petitioner had requested in writing the correct instruction setting forth his factual theory of the case although he eschewed taking any objection to the Court's charge as given. In terms of the rationale of Rule 51 and considering Rule 46 in conjunction with Rule 51, certainly the Court was apprised of the correct instruction and certainly an objection in this case would have served no more purpose than a formal exception to a ruling on evidence. In fact, the 5th Circuit has had considerable difficulty with the problem of just how far Rules 46 and 51 coalesce. In *Kelite Products v. Binzel* 224 F. 2d 131 (5th Cir. 1955), the Court held that Rule 51 had been literally complied with and stated "It is unnecessary to decide whether it should be read together with Rule 46 in order to mitigate its rigor as some Circuits have held." 224 F. 2d at 143 (Footnote 11a). In *Louisiana & Arkansas Railway Co. v. Moore*, 229 F. 2d 1 (5th Cir. 1956), the Court again had its doubts as to the applicability of Rule 46 in this context, but stated that the error was noticeable anyway and proceeded to consider the problem. And in *Mondshine v. Short*, 196 F. 2d 606 (5th Cir. 1952), the Court again specifically declined to assess the effect of Rule 46 on Rule 51. In the instant situation the entire

matter was apparently by-passed. Nevertheless, there does appear to be considerable foundation in other circuits for reading Rule 46 together with Rule 51 and specific holdings to this effect include *Montgomery v. Va. Stage Lines*, 191 F. 2d 770 (D.C. Cir. 1951); *Williams v. Powers*, 135 F. 2d 153 (6th Cir. 1943); *Wright v. Farm Journal Inc.*, 158 F. 2d 976 (2d Cir. 1947); cf. *Hower v. Roberts*, 153 F. 2d 726 (8th Cir. 1946).[4] But in *Greinke v. Yellow Cab Co.*, 250 F. 2d 865 (7th Cir. 1958), the 7th Circuit held specifically that a failure to object foreclosed assigning as error the refusal of the trial court to give a tendered written instruction, the reason for which had been pointed out to that Court. This holding conflicts directly with the cases cited above and this melange of viewpoints amongst the various circuits on a critical appellate problem would certainly seem to constitute a basis for this Court to grant certiorari in this case.

4. Rule 51 in a sense is a formulation of a long-standing federal practice in which errors are by-passed

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[4]The *Hower* case does not involve Rule 46 directly. No written requests for charge was submitted. After the oral charge by the court, a colloquy occurred in which counsel requested a certain charge. The court refused and no objection was made. There was a reversal because of plain error, the court holding that counsel had sufficiently apprised the trial judge of his objection to the charge. The 8th Circuit may have changed its mind since this decision, for in *O'Malley v. Cover*, 221 F. 2d 156 (8th Cir. 1955) a specific objection to a certain part of the charge was made in such terms as to apprise the trial judge of what was involved. The appellate court seized on the word "distinctly" in Rule 51 and held that the appellant had not been sufficiently distinct although it was probable that the court's attention had been called to the error and why there was error. The latest action of the 8th Circuit and its conflict in approach to the earlier *Hower* case is akin to the viewpoint expressed by the 1st Circuit in *Turner Construction Co. v. Houlihan*, 240 F. 2d 435 (1st Cir. 1956).

unless preserved below. See, e.g., former Rule 8 of this Court. Under this practice, however, sufficiently egregious error has always been noted. E.g. *Sibbach v. Wilson*, 312 U.S. 1 (1941). However, Rule 51 marks the first time that errors in the charge as such have been segregated from all other aspects of error in the trial below. This Court has never considered whether or not this fact in itself should give rise to a standard of review that might be dissimilar from standards previously announced when error in the abstract as committed in the lower court was being considered. Some types of errors are always noticed by the appellate court. Thus if the lower court was without jurisdiction, or if the pleadings failed to state a cause of action, appellate courts have had no difficulty, despite absence of objections, in reversing. See e.g., Campbell, *Extent to which Courts of Review Will Consider Questions Not Properly Raised and Preserved*, 7 Wisc. L. Rev. 91 (1932). The question arises: does not an error in the charge compare more nearly with this kind of error than with, say, the kind of error involved when counsel fails properly to object to a certain type of evidence? The charge of the court is uniquely a produce of the federal district judge. May it not be that a litigant has the right to assume that this judge, as one of the prime repositories of the confidence citizens of this country have in the federal judicial system, knows the appropriate rules and can enunciate them correctly? As Judge Frank in a concurring opinion in *Troupe v. Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253 (2d Cir. 1956) stated: "A litigant surely has the right to assume that a federal trial judge knows the elementary substantive legal rules long established by the precedents, and that therefore the judge will act accordingly, without prompting by the litigant's lawyer." 234 F. 2d at p. 261. That opinions in the past have not dis-

criminated between the kind of error involved in a judge's charge and the problem of plain error in the abstract is in part due to the fact that, prior to the adoption of the Federal Rules, there was no formula which considered the charge separately from other portions of the proceedings below. Rule 51 makes this distinction. This Court has never decided whether or not the distinction has meaning in terms of plain error. It would seem appropriate for some attention to be given to the problem of whether or not error in the charge differs from other kinds of error.

In a larger sense, moreover, the problem raised by the plain error concept is a jurisprudential one and goes to the heart of the difficulties inherent in the adversary system of justice that obtains in our legal pattern. There has been considerable writing to the effect that appellate courts should consider error apart from that specifically objected to in the lower court. See, e.g., Pound, *Appellate Procedure in Civil Cases*, passim (1941) where Dean Pound criticizes "record worship" and proposes flexibility. Critics of the adversary system, such as the late Chief Justice Vanderbilt of New Jersey, have been numerous. To the extent that an appellate court is willing to notice plain error and reverse accordingly, the difficulties inherent in extracting an indefinable "justice" out of a specific congeries of facts as presented by two opposing litigants in a partisan framework is diminished.

Indubitably, there are several considerations which militate against outright abandonment of the requirement that objections be presented to the lower court. However, one objection frequently asserted in circuit court considerations of the plain error problem, that of a fairness to the trial judge, would appear to have little merit in the

framework of a litigable issue that is sufficiently important to the parties to have reached the appellate court. Similarly, the objection that it is unfair to the other side to notice plain error would appear to be spurious, for no unfairness results from depriving a party of a judgment below to which he was not entitled. Some objections, such as the fact that litigation tends to be prolonged, undoubtedly have merit, but most judicial discussions of the problem ignore the fact that there is another point of view and, indeed, an entire jurisprudential philosophy that would sanction appellate reversal much more liberally than the federal circuit courts, acting without guidance from this Court, have reversed in the past. Discussion of this problem is afforded by the facts of this case and amplification of this court's attitude towards the inquiries here expressed would be of measurable benefit to litigants in general and to the federal circuits in particular.

5. Reference has been made above as to how this case raises the problem of the effect of Rule 46 on Rule 51. The other matters noted above: lack of an articulated standard, and the essentially jurisprudential factors that are involved in any plain error problem are also appropriately present. As the statement of facts notes, there are two separate errors. The 5th Circuit's treatment of these two points was incorrect. The first error related to the court's instruction that an ambiguity in a contract is to be construed most strongly against the party who drafted the contract. However, as the President of the Respondent corporation himself noted, the circumstances of the drafting of the contract were such that, after the parties had come to an oral understanding, a secretary was called in and the Petitioner dictated the agreement. After it was typed up everybody in the room read it and everybody

agreed that what had been dictated was the essence of the agreement, whereupon the typed draft was signed (R. 70). Petitioner was thus simply a funnel for reducing the mutual understanding of the parties to writing and his part in essence was of little more moment than that played by the secretary. Yet the court instructed that if there was an ambiguity it was to be construed against Petitioner because of his dictation. The court of appeals apparently relied on the fact that the jury was permitted to find that Petitioner was the draftsman. See App. A page 1, footnote 1. However, the testimony was not in dispute as to how the contract came to be drafted. To the jury the phrase "did draw this contract" as used by the court meant only that petitioner was the man who did the dictating. The charge should not have been given at all. The qualifying phrase "should you be convinced by the testimony that Mr. Sadacca drew this contract", relied on by the court of appeals qualified nothing for there was no dispute and no conflict on the point noted. The court utterly failed to distinguish the situation from one in which a party to a contract is presented with a complex written form and has no voice in the drafting of the agreement. The harsh contra proferentem rule should not have been a part of the instruction in *any* sense, and only served to mislead the jury.[5] Even under the unpredictable standards that inhere

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[5]E.g., *Carter v. Certain-Teed Products Corp.*, 102 F. Supp. 280 (N.D. Iowa 1952) *mod. on app.* 200 F. 2d 754 (8th Cir. 1953); *McFarland v. Gillioz*, 327 Mo. 690, 37 S.W. 2d 911 (1931); *Moore v. Freeman*, 58 N. Mex. 139, 266 P. 2d 674, 679 (1954); *Beck v. F. W. Woolworth Co.*, 111 F. Supp. 824 (N.D. Iowa 1953); *McLendon v. Eubanks*, 249 Ala. 170, 30 So. 2d 261 (1947); *Associated Lathing and Plastering Co. v. Louis C. Dunn, Inc.*, 135 Cal. App. 2d 40, 286 P. 2d 825 (1955); *Delaware County Dairies v. White*, 75 N.Y.S. 2d 434 (Sup. Ct. 1947) *mod. on app.* 80 N.Y.S. 2d 392 (1948).

in any consideration of plain error it can be stated that the error here was material,[6] and that it was reasonably apparent.

The instruction on the waiver issue deleted the theory of the case put forth by Petitioner. The substantial evidence tending to show that Respondent had waived its right to have Petitioner do what, under Respondent's construction of the contract, he was supposed to do, appears in the statement of facts, supra, page 5. The court omitted any reference to these facts and simply defined the doctrine of waiver in language hardly more helpful to the jury than the term waiver itself. See instructions to the jury App. B. infra. This omission by the court was erroneous. *Montgomery v. Va. Stage Lines, supra; Chicago & N.W. Railway Co. v. Green*, 164 F. 2d 55 (8th Cir. 1947); *Chicago, Rock Island & Pacific Railway Co. v. Lint.*, 217 F. 2d 279 (8th Cir. 1954). The failure of the Fifth Circuit to notice the error in this instruction conflicts with the holding of the District of Columbia Circuit in the *Montgomery* case. Although a different kind of instruction was there involved certainly the principle is quite similar. The court there held that a general instruction on negligence and proximate cause was inadequate, and that the omission of a specific charge on the facts—improper loading of baggage on an overhead rack—was plainly erroneous. Petitioner submits that "negligence" and "proximate cause" are on the same level of generality, in semantic

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[6]The jury was confronted with a testimonial situation in which two witnesses for each side asserted that the contract meant the opposite of what the other side said. In the midst of this conflict the jury was told that if they had any doubts resolve them against the draftsman. This was virtually tantamount to a direction, or at least an invitation, to find for the Respondent.

terms, as "waiver", and that specific pinpointing of how such waiver could have occurred is just as proper in this case as was the loading of the baggage instruction in the *Montgomery* case. The Court's ignoring of the Montgomery decision, which had been pointed out to it via Petitioner's brief, is illustrative of the lack of standards that obtain in this area, and of the utility of any clarification by this Court of what "plain error" means.

This case presents appropriate facts for this Court to enunciate a reasonably specific standard which would remove the imprecision that the term "plain error" connotes. Similarly, the problem of the inter-relationship of Rule 46 and Rule 51 is appropriately present and can be resolved by a decision in the instant case. Moreover, the important jurisprudential concept of just how far the adversary theory of justice is to be delimited by relative liberalization in noticing errors not presented to the trial court, is present in this case and an illuminating discussion could be predicated on the facts. A clarification of the plain error problem would result in the elimination of many purposeless appeals and would lighten the burden of the appellate courts.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

CLAUDE PEPPER
WALTER A. APFELBAUM
AARON FOOSANER
Counsel for Petitioner

PROOF OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit was mailed this 9th day of July, 1958, to Earl W. Waldin, Jr., Attorney for the Respondent, Alfred I. DuPont Building, Miami, Florida.

Walter A. Apfelbaum

APPENDIX A

In The United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 16795

HENRI SADACCA,

Appellant,

versus

NYLONET CORPORATION,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(April 18, 1958.)

Before CAMERON, JONES and BROWN, Circuit Judges.

PER CURIAM: With highly commendable candor which does not seek to disguise the fact that no exceptions, FRCP 51, were taken, appellant complains of two alleged errors[1] in the Court's charge to the jury and urges this Court to notice them as plain error. But plain error, of which this Court may take notice, *Dowell Inc. v. Jowers*, 5 Cir., 166 F.2d 214, 221; *Louisiana & Arkansas Ry. Co.*

v. Moore, 5 Cir., 229 F.2d 1, 2; *Reeve Bros. v. Guest*, 5 Cir., 131 F.2d 710, 712; *United States v. Atkinson*, 297 U.S. 157, 80 L.ed. 555, has not been demonstrated as to either.

Nor is the verdict for Nylonet in the main suit and against Sadacca on his counterclaim inconsistent as appellant insists. Although it is true that to find for Nylonet the jury had to recognize that the contract existed and was the basis for recovery, the jury was entitled to find that Sadacca had not performed. That left only the damages suffered by Nylonet and these were allowed. Indeed, if Nylonet were compelled to pay Sadacca for performance not rendered by Sadacca, its damages would be *increased* in like amount.

AFFIRMED.

1 The first attacks as inapposite the instruction that ambiguity in a contract is to be construed most strongly against the party who drafted it. Here the jury was permitted to find that Sadacca was the draftsman.

The second is aimed at the general instruction on the doctrine of waiver by the plaintiff of performance under the disputed contract provisions rather than a specific charge on appellant's factual theory from which, if believed, waiver could be found to have occurred.

A true copy

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
New Orleans, Louisiana

JUDGMENT.

Extract from the Minutes of April 18, 1958.

HENRI SADACCA,

No. 16795. versus

NYLONET CORPORATION.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Henri Sadacca, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

APPENDIX B

The District Court's Instructions to the Jury

(a) *Petitioner's Requested Instruction on the Issue of Waiver*

"I charge you that strict and full performance of a contract may be waived by the person in whose benefit the contract is made. Waiver can be defined as a voluntary abandonment of a known legal right. If Nylonet Corporation had the right to require the defendant, HENRI SADACCA, to supervise manufacturing and purchasing of the article known as 'Weather Bonnet', and if you find that the plaintiff, NYLONET CORPORATION, did not require the defendant, HENRI SADACCA, to supervise the manufacturing of the product known as the 'Weather Bonnet', that whatever they did not exact from the defendant, HENRI SADACCA, can be considered to have been waived by them. If you find that NYLONET CORPORATION, through its agents or officers, told HENRI SADACCA, the defendant, that they would negotiate with the manufacturer of the 'Weather Bonnet' they thus waived their right to require HENRI SADACCA, to supervise, manufacturing and purchasing and thus they cannot recover damages for his failure to perform." (R. p. 225)

(b) *The Waiver Instruction as Given*

I charge you that strict and full performance of a contract may be waived by the person in whose

benefit the contract is made. Waiver can be defined as a voluntary abandonment of a known legal right. If you find that the Nylonet Corporation waived their right to require Henri Sadacca to supervise manufacturing and purchasing, then, if you so find, they cannot recover damages for his failure to perform. (R. p. 188)

(c) *The Contra Proferentem Instruction as Given*

You are instructed that when one of the parties to a contract in writing draws the contract, any ambiguity in terms is to be construed most strongly against that party.

Should you be convinced by the testimony that Mr. Sadacca did draw this contract, then if you have any doubt as to the meaning of any terms in this contract, such doubt should be resolved in favor of the Plaintiff, Nylonet Corporation, and against the Defendant, Henri Sadacca. (R, p. 187)

APPENDIX C

The Contract In Question

September 30, 1952

Mr. Lewis M. Escott, President
Nylonet Corporation
2075 N. W. 75th Street
Miami 47, Florida.

Dear Mr. Escott:

This will confirm our understanding with reference to the Weather Bonnet samples that were left with you and I, personally, will supervise manufacturing and purchasing of this Weather Bonnet that you will market under the name of "Nylonet", or any other name.

In consideration for the services that I will render, you agree to pay to me five cents (5c) on each Weather Bonnet that is sold; that I have the right to assign this Agreement to an individual or firm or corporation on or before January 31, 1953.

It is understood that I will not derive any benefit directly or indirectly in devoting my time to supervise and purchase Weather Bonnets from contract manufacturers for the account of your Company. If this is in accordance with your understanding, this Agreement to remain in force as long as you are engaged in selling Weather Bonnets.

It is further understood that I, directly or indirectly, will not engage in a similar product.

Very truly yours,

(Signed) Henri Sadacca
HENRI SADACCA

ES/ar

Accepted by:

NYLONET CORPORATION
/s/ Lewis M. Escott

By: Lewis M. Escott, Pres.
2075 N. W. 75th St.
Miami 47, Florida
Phone 84-3535

(Record p. 6-7)